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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1583

FRANCES MORRIS, *et al.*,
Appellants,

v.

L. MARION GRESSETTE, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of South Carolina

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BRIEF FOR APPELLANTS

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On Appeal from the United States District Court for the District of South Carolina

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BRIEF FOR APPELLANTS

This is an appeal from the decision of a three-judge United States District Court sitting in the District of South Carolina, which denied an injunction against the enforcement of a South Carolina legislative redistricting statute and dismissed appellants' complaint.

OPINION BELOW

The opinion of the United States District Court for the District of South Carolina, Charleston Division (Haynsworth and Russell, C.JJ., and Hemphill, D.J.),

is not yet reported. A copy of the opinion is appended to appellants' Jurisdictional Statement as Appendix A (J.S. App. 1a). The unreported opinion in the related case of *Twiggs* v. *West*, Civ. No. 71-1106 (D.S.C. Apr. 7, 1972), is appended thereto as Appendix B (J.S. App. 26a).

JURISDICTION

This action was brought under Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c, for declaratory and injunctive relief against the enforcement of an act of the South Carolina legislature reapportioning the State Senate. Jurisdiction in the district court was founded on 28 U.S.C. §§ 1331 and 1343 and 42 U.S.C. § 1973c. The district court entered its judgment on March 12, 1976 and denied appellants' Motion to Alter or Amend Judgment on March 30, 1976. J.S. App. 50a. Appellants filed their notice of appeal in the district court on April 16, 1976. J.S. App. 51a. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1253 and 2101(b). *See Georgia* v. *United States*, 411 U.S. 526 (1973); *Perkins* v. *Matthews*, 400 U.S. 379 (1971); *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969).

STATUTES INVOLVED

Section 2 of Act 1205 of 1972, S.C. CODE § 30-4.4 ("Act 1205"), is set forth as Appendix E to the Jurisdictional Statement (J.S. App. 52a). Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c, is set forth as Appendix F to the Jurisdictional Statement (J.S. App. 57a).

QUESTIONS PRESENTED

1. Whether the court below erred in declining to enjoin the enforcement of the South Carolina Senate reapportionment law pursuant to Section 5 of the Voting

Rights Act where the Attorney General had objected to the law and the State had not obtained preclearance from the District Court for the District of Columbia.

2. Whether a decision by the Attorney General that he is legally barred from making an independent determination of the validity of a state voting law submitted to him for clearance under Section 5 of the Voting Rights Act is subject to judicial review under the Administrative Procedure Act.[1]

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[1] In their Motion to Alter or Amend Judgment (App. 57) which was denied below, and in their Jurisdictional Statement, appellants raised the issue whether Act 1205 might be considered a court-ordered plan rather than one subject to Section 5 under this Court's recent decision in *East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976). App. 59; J.S. 18-19 and n.15. Appellants argued that Act 1205 is not a court-ordered plan, but that if it were, it would be invalid under this Court's ruling that district courts considering reapportionment plans may not approve multi-member districts "absent particularly pressing features." *Chapman* v. *Meier*, 420 U.S. 1, 19 (1975); *see* J.S. 20-22.

Extended treatment of this question appears unnecessary here since South Carolina has conceded and the United States has agreed that Act 1205 requires preclearance under Section 5 and is not a court-ordered plan. The court below pointed out that "[i]t is conceded by all parties that the challenged legislation is within the coverage of the Voting Rights Act of 1965 and that compliance with Section 5 of the Act was a condition to the enforcement of such legislation." J.S. App. 2a. Appellees cite this quote with approval in their Motion To Affirm (Mot. to Aff. 18) and flatly state, after contrasting the facts of this case with those of *East Carroll Parish*, that Act 1205 "was an Act by the General Assembly of South Carolina acting with full legislative authority under the State Consitution." Mot. to Aff. 18 n.53. Similarly, the United States, in its amicus brief on jurisdiction in this Court (Brief of the United States as Amicus Curiae, November, 1976, hereinafter cited as "U.S. Juris. Br."), expressed its belief "that the plan is not a court-ordered plan within the meaning of *East Carroll*" (U.S. Juris. Br. 9-10 n.6) and could not be effective until cleared under Section 5. *Id.* The United States further stated that if this Court were to determine that Act 1205 is a court-ordered plan, the presumption against the use of multi-member districts would apply. *Id.*

STATEMENT OF THE CASE

This case involves an attempt by black South Carolina voters to enjoin the continued implementation of South Carolina's 1972 Senate reapportionment law, Act 1205 of 1972 ("Act 1205"), on the ground that the State has not obtained preclearance of the plan as required by Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973c ("Section 5").[2]

Although the Attorney General had earlier objected to a predecessor statute which contained the same basic features as Act 1205, the Attorney General initially declined to object to Act 1205 when it was submitted to him under Section 5.[3] The ground for the Attorney General's nonobjection was that he felt "constrained to defer"[4] to an earlier decision of a South Carolina three-judge district court upholding Act 1205 against challenges under the Fourteenth and Fifteenth Amendments. The Attorney General's failure to object was reviewed by the District of Columbia federal courts, exercising jurisdiction under the Administrative Procedure Act, 5 U.S.C. §§ 701-706 ("APA"). Those courts held that the Attorney General had committed legal error in declining on the ground stated to object to Act 1205, and ordered him to reach a reasoned determination of his own. The Attorney General thereupon independently

[2] Under Section 5, covered jurisdictions such as South Carolina are prohibited from enforcing a change in a voting law or practice in effect on November 1, 1964 unless and until either the proposed change has been submitted to the Attorney General of the United States and he "has not interposed an objection within sixty days after submission," or a three-judge district court in the District of Columbia declares the change to be without discriminatory purpose or effect (J.S. App. 57a).

[3] Letter of June 30, 1972 from Assistant Attorney General David L. Norman to the Attorney General of South Carolina, Daniel R. McLeod, App. 47.

[4] *Id.*

reviewed Act 1205 and on July 20, 1973 advised the State that he was entering an objection.[5]

South Carolina chose not to adopt a new apportionment plan in response to the Attorney General's objection or to pursue its alternative Section 5 remedy of seeking preclearance from the District Court for the District of Columbia. Despite the lack of Section 5 clearance South Carolina announced that it would continue to implement Act 1205. The present action before a three-judge district court was then brought under Section 5 to enjoin the continued implementation of South Carolina's statute. The court below dismissed the complaint.

The Facts

A. *Act 932*

In 1971 South Carolina enacted Act 932, the precursor to Act 1205. Act 932 reapportioned the State Senate by creating many multi-member districts having significant minority concentrations of black voters. It required candidates in those districts to run for numbered posts. A preexisting South Carolina "run-off election" statute (S.C. Code § 23-496) prevented any candidate from winning a Senate primary election by less than a majority vote.

South Carolina submitted Act 932 to the Attorney General pursuant to Section 5, and he interposed an objection to the statute on March 6, 1972, on the ground that South Carolina had not met its burden of proving nondiscrimination. His letter of objection said that he was "unable to conclude . . . that the combination of multi-member districts, numbered posts, and a majority

[5] Letter of July 20, 1973 from Assistant Attorney General J. Stanley Pottinger to the Attorney General of South Carolina, Daniel R. McLeod, App. 51.

run-off requirement would not occasion an abridgment of minority voting rights in South Carolina."[6]

Meanwhile, two suits had been filed in 1971 before a three-judge United States District Court for the District of South Carolina, attacking Act 932 as violative of the Fourteenth Amendment under the one-man, one-vote rule; a third suit attacked the law under the Fifteenth Amendment and sought to enjoin its enforcement until and unless it should be precleared pursuant to Section 5.[7] The Attorney General advised the district court of his Section 5 objection to Act 932 and asked the court to enjoin the enforcement of it on that ground without reaching the constitutional issues. The district court, however, proceeded to decide the constitutional issues, holding that the Act violated the Fourteenth Amendment by creating large population disparities among districts, but also holding that the black plaintiffs had not carried the burden of proof on their Fifteenth Amendment claim. The court expressly declined to rule on the claims under Section 5, recognizing that it was without jurisdiction to do so:

> "[T]he District Court for the District of Columbia . . . is the proper forum for review under the terms of the Voting Rights Act of 1965. We shall accordingly not consider the claims of the plaintiff . . . under the Voting Rights Act, but shall confine our consideration to the claims of invalidity

[6] Letter of March 6, 1972 from Assistant Attorney General David L. Norman to the Attorney General of South Carolina, Daniel R. McLeod, App. 26.

[7] The first such case had been filed by the Attorney General of South Carolina, at the request of the South Carolina General Assembly, seeking judicial approval of the reapportionment under the Fourteenth Amendment. A second suit was filed the same day by a plaintiff whose counsel was a member of the General Assembly. At this point a number of black citizens filed a separate action in which they attacked Act 932 as invalid under the Fourteenth and Fifteenth Amendments and under the Voting Rights Act.

> under the Fourteenth and Fifteenth Amendments . . . ." *Twiggs* v. *West*, Civ. No. 71-1106 (D.S.C. Apr. 7, 1972). J.S. App. 26a, 30a.

The court gave the South Carolina legislature thirty days to enact another apportionment plan, failing which the court would draw up a plan itself. J.S. App. 45a, 48a.

B. *Act 1205*

On May 5, 1972, the legislature enacted Act 1205 (the statute involved here). It created alternative plans "A" and "B" for reapportionment of the State senatorial districts.[8] Plan A which was eventually implemented varied only slightly from Act 932: It reduced the population disparities, but aggravated the multi-member district structure cited in the Attorney General's objection to Act 932 by creating more multi-member districts. The State submitted the new act to the Attorney General under Section 5. Simultaneously, it transmitted a copy to the South Carolina district court, which, without according a hearing, entered an order *sua sponte* finding the Senate reapportionment in Act 1205 to be constitutional.[9]

By letter of June 30, 1972, the Attorney General declined to object to Section 2 of Act 1205, explaining that he would not exercise his own judgment under Section 5 but felt "constrained to defer to the . . . determination of the three-judge District Court" in *Twiggs* v. *West, supra.*[10]

[8] Section 2 of Act 1205 of 1972, S.C. CODE § 30-4.4., J.S. App. 52a.

[9] *Twiggs* v. *West*, Order of May 23, 1972 (D.S.C., Civ. No. 71-1106), *aff'd mem. sub nom. Powell* v. *West*, 413 U.S. 901 (1973). (The appeal was on behalf of a political party and raised no racial discrimination or Section 5 questions.)

[10] Letter of June 30, 1972 from Assistant Attorney General David L. Norman to the Attorney General of South Carolina, Daniel R. McLeod, App. 47, 48.

In the same letter the Attorney General did object to related legislative enactments: Section 3 of Act 1205 and Act 1204, which had been submitted while Act 1205 was pending before the Attorney General. Section 3 of Act 1205 provided for numbered seating in all existing multi-member districts of the State House of Representatives. Act 1204 provided for numbered seats in *all* multi-member elective districts in South Carolina. The reason given by the Attorney General for reaching a different result when such features were made applicable to the lower house of the legislature and to other offices was that "[u]nlike the situation with respect to the Senate reapportionment plan, we [the Attorney General's office] review these acts [Section 3 of 1205 and Act 1204] without any prior judicial determination of constitutional validity . . . and with the burden of proof being on the submitting authority." [11]

Black South Carolina voters then brought suit against the Attorney General on August 10, 1972 in the United States District Court for the District of Columbia. They sought a ruling that the Attorney General was required to make an independent determination of the validity of the Senate reapportionment under Section 5 without "deferring" to the three-judge district court for South Carolina. On August 11, 1972, the District Court for the District of Columbia (Green, J.) entered an interim order finding that the Attorney General's time for objecting to Act 1205 had not yet expired and extending his time to object pursuant to 5 U.S.C. § 705, in order to avoid any question as to the court's jurisdiction to

[11] *Id.* 49. The South Carolina House of Representatives, which was reapportioned in 1974 to include only single-member districts, now contains 13 blacks out of 124 members. In contrast, the Senate, which retains numbered posts and multi-member districts under Act 1205, continues to have no black members, although over 25% of the State's registered voters are black. *See* South Carolina Election Commission, Report for the Period Ending June 30, 1973, at 574 (1974).

grant the relief requested in the complaint.[12] By direction of the district court, South Carolina was notified of this order by the Attorney General on or about August 14, 1972.[13]

On cross motions for summary judgment, the District Court for the District of Columbia held that the Attorney General's refusal to exercise his Section 5 responsibilities was reviewable for legal error under the APA, 5 U.S.C. § 702, and that the Attorney General had wrongly "abdicated" those responsibilities by purporting to defer to a court decision that had expressly declined to pass on the Section 5 question. The district court ordered the Attorney General to make his own independent determination of the validity of Act 1205 under Section 5. *Harper* v. *Kleindienst*, 362 F. Supp. 742 (D.D.C. 1973).

The Attorney General thereafter reviewed Act 1205 under the standards of Section 5 and filed with the court on July 16, 1973 a memorandum containing his decision.[14] He concluded that

> "[W]e were and still are compelled to conclude that Act 1205 has a clear and substantial racial effect in contravention of the Fifteenth Amendment and its protections under Section 5 of the Voting Rights Act. Indeed, the reasons for finding a contravention of the Fifteenth Amendment in the first set of senate plans submitted (Act No. 932), as we did in our objection letter of March 6, 1972, are

[12] Order of August 11, 1972, *Harper* v. *Kleindienst*, C.A. No. 1607-72 (D.D.C. 1972), appended hereto as Appendix A.

[13] *See* Stipulations Par. 11, App. 55.

[14] *See* Memorandum of the United States in Response to the Court's Order of May 16, 1973 (filed July 16, 1973) in *Harper* v. *Kleindienst*, 362 F. Supp. 742 (D.D.C. 1973), appended hereto as Appendix B.

> also present upon reviewing the existing Act in question (Act No. 1205)" [15]

Nonetheless, in the second part of the memorandum the Attorney General reaffirmed his refusal to object to Act 1205 on the ground that he was "constrained" to defer to the decision of the South Carolina District Court in *Twiggs* v. *West*.[16] On July 19, 1973, the district court issued a further order reciting that the Attorney General had "represented in open court that if the Attorney General considered Act 1205 without regard to the decision of the three-judge district court in *Twiggs* v. *West* he would enter an objection to such Act," and directing the Attorney General to perform such an independent review. On July 20, 1973 the Attorney General advised South Carolina of his objection to Act 1205, citing the "reasons set forth in the Attorney General's decision of July 16, 1973 and in our March 6, 1972 letter objecting to Act 932." [17]

On appeal to the United States Court of Appeals for the District of Columbia Circuit, the Attorney General challenged, *inter alia*, the reviewability of his determination under Section 5 as to Act 1205 and asserted the right and duty to defer, in making that determination, to the decision of the three-judge district court in South Carolina as to the constitutional validity of the Act.

The court of appeals (per Judge Robinson) affirmed the judgment of the district court (Judge MacKinnon dissenting as to the reviewability issue only), holding that the refusal of the Attorney General to exercise his own judgment pursuant to Section 5 was an error of law properly correctible on review under the APA. *Harper*

[15] *Id.* at 6, Appendix B attached hereto at 8a.

[16] *Id.* at 7, Appendix B attached hereto at 8a.

[17] Letter of July 20, 1973 from Assistant Attorney General J. Stanley Pottinger to the Attorney General of South Carolina, Daniel R. McLeod, App. 51, 52.

v. *Levi*, 520 F.2d 53, 69 (D.C. Cir. 1975). Certiorari was not sought by the Attorney General.

C. *South Carolina's Actions*

As noted, South Carolina submitted Act 1205, like its predecessor Act 932, to the Attorney General for preclearance under Section 5. While the Attorney General initially stated that he would not object to Act 1205, the Attorney General formally notified South Carolina of the court's August 11, 1972 order extending the Attorney General's time to object. *See* note 13 *supra*. South Carolina never sought relief from that order. Nor, since the State was notified on July 20, 1973 of the Attorney General's objection to Act 1205, has the State sought preclearance by the alternate statutory route of a declaratory judgment action in a three-judge District of Columbia federal district court. Indeed, the South Carolina State Senate caucused and decided on November 5, 1975 to continue enforcing Act 1205 despite the Attorney General's objection.[18]

D. *The Proceedings Below*

On November 7, 1975 appellants filed this suit, seeking declaratory and injunctive relief against the enforcement of Act 1205 in the then upcoming 1976 Senate elections. The United States, appearing as amicus curiae, acknowledged the correctness of the *Harper* determination that the Attorney General was obligated to reach his own independent judgment on Act 1205. And the United States urged the district court to give full effect to the Attorney General's objection to Act 1205 reflecting that independent judgment.[19] The United States also sug-

[18] *Senate Plans Remap Suit*, The State (Columbia, South Carolina), November 6, 1975, at 1; *see* Stipulations, Par. 12, App. 55.

[19] Amicus Memorandum of the United States, filed Jan. 28, 1976 in the court below. The United States noted that, under *Connor* v.

gested that *Connor* v. *Waller*, 421 U.S. 656 (1975), and *Chapman* v. *Meier*, 420 U.S. 1 (1975), counseled imposition of a single-member plan should it become necessary for the district court to fashion an interim plan for the 1976 Senate elections.

After a hearing, the three-judge district court denied the requested relief and dismissed the complaint on March 12, 1976. The court held that it need not follow the District of Columbia Circuit's decision in *Harper* v. *Levi*, because the State had not been a party to the prior suit. It further held that the District of Columbia courts had erred in holding that the Attorney General's initial refusal to make his own determination of the validity of Act 1205 was reviewable. Although it did not dispute the *Harper* district court's authority to extend the deadline for the Attorney General's objection, the court below held that the objection made in response to *Harper* had no effect and that South Carolina is free to enforce Act 1205.

On March 22, 1976, in order to insure a complete disposition of all issues pertaining to Act 1205 in this proceeding, appellants moved to alter or amend the judgment, apprising the district court of the possible bearing of this Court's decision in *East Carroll Parish School Board* v. *Marshall*, 424 U.S. 636 (1976). Appellants simultaneously requested an injunction pending appeal. The district court on March 30, 1976 denied these motions without opinion.

This appeal followed. On April 28, 1976 appellants filed their Jurisdictional Statement with this Court.

Waller, 421 U.S. 656 (1975), the Attorney General and the District Court for the District of Columbia have exclusive jurisdiction over laws covered by Section 5, and other district courts are precluded from ruling on constitutional challenges based on racial discrimination until preclearance has been obtained. The United States reiterated this position in its Amicus Brief in this Court, filed in November 1976. *See* U.S. Juris. Br. 8 n.4, 12.

Thereafter, on May 7, 1976, appellants applied to the Chief Justice for an injunction pending appeal; this request was denied on May 12, 1976. In response to this Court's invitation for an expression of the views of the United States, a brief amicus curiae in support of the statement as to jurisdiction was filed by the United States. Probable jurisdiction was noted on December 6, 1976.

SUMMARY OF ARGUMENT

I

The South Carolina Senate reapportionment plan (Act 1205) could validly be given effect only if precleared under Section 5 of the Voting Rights Act. The Attorney General having objected, and no clearance having been sought from the District of Columbia District Court, continued enforcement of Act 1205 should have been enjoined by the court below. South Carolina's failure to participate in the judicial review proceedings in *Harper* which resulted in the Attorney General's objection does not free South Carolina from the obligation to comply with the Voting Rights Act.

The court below erred in holding the Attorney General's objection untimely. That objection was entered after the District of Columbia District Court had lawfully extended the 60-day period provided by Section 5 for the entry of such objections. The validity of the district court's interim extension order does not turn on the reviewability of the Attorney General's action, since courts may grant interim relief while determining their basic jurisdiction and such interim relief would not be invalidated by a subsequent determination of a lack of basic jurisdiction. *United States* v. *United Mine Workers*, 330 U.S. 258 (1947).

II

Quite apart from the district court's interim extension order, the Attorney General's objection to Act 1205 was timely because it was made in response to judicial orders

in a lawful review proceeding. *International Harvester Co.* v. *Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973). The Attorney General's determination that he was legally barred from exercising an independent judgment as to the validity of Act 1205 under Section 5 of the Voting Rights Act was judicially reviewable pursuant to the Administrative Procedure Act. Such a determination is not within any of the exceptions to the presumption of review created by the APA. The Voting Rights Act does not in terms bar review of Section 5 determinations (as it does in the case of census determinations under Section 4). Determinations of the Attorney General under Section 5 are not committed to his discretion but involve the quasi-judicial function of applying established legal standards to facts presented. And other remedies at law are wholly inadequate; indeed it was their inadequacy that led Congress to fashion the Section 5 preclearance procedures. To deny review of purely legal determinations of the Attorney General under Section 5 would permit a legal error of the Attorney General to nullify the protections afforded by Section 5.

III

Appropriate relief is required to prevent continuation of the uncleared Senate apportionment plan until the next regularly scheduled Senate elections in 1980. Unless South Carolina promptly obtains Section 5 clearance of a Senate apportionment plan, the district court should impose a valid plan. The relief granted should be tailored to insure a properly constituted State Senate by no later than 1978.

ARGUMENT

I. The Implementation of Act 1205 Violates Section 5 of the Voting Rights Act and Should Have Been Enjoined by the Court Below.

The position of appellants herein is neither novel nor complex. What is involved is a plain violation by South Carolina of Section 5 of the Voting Rights Act—a violation which appellants seek to remedy through the issuance of an injunction against the continued unlawful implementation of Act 1205. There is no dispute, as the court below held, "that the challenged legislation is within the coverage of the Voting Rights Act of 1965 and that compliance with Section 5 of that Act was a condition to the enforcement of such legislation." J.S. App. 2a. Section 5 prohibits the implementation of such legislation unless the covered jurisdiction obtains clearance from the Attorney General or obtains a declaratory judgment from a three-judge United States District Court for the District of Columbia that such legislation is not discriminatory in purpose or effect.

This appeal is the culmination of a proceeding which began when South Carolina decided to follow the first of these clearance routes and submitted Act 1205 to the Attorney General for clearance. The District Court for the District of Columbia thereafter extended the period for action by the Attorney General under Section 5. Since the Attorney General objected to Act 1205 within such extended period, South Carolina is barred by the Act from effectuating that legislation unless it can obtain the necessary declaratory judgment from the District Court for the District of Columbia.

South Carolina's position in this proceeding and the holding of the court below rest on the essential premise that the objection by the Attorney General to Act 1205 was of no effect. In order to reach this result, it is necessary to treat as nugatory the actions of the District Court for the District of Columbia. *See* pp. 8-9 *supra*. It is clear, however, that the actions of the District of Columbia federal courts cannot be disregarded. And this is so regardless of whether the District of Columbia courts were correct in concluding that they had authority under the APA to review the Attorney General's refusal to make an independent determination as to Act 1205. Those courts had, in any event, authority to suspend the

60-day objection period while determining their own jurisdiction.[20]

As this Court has held in a similar context, "the District Court had the power to preserve existing conditions while it was determining its own authority" to grant the relief requested; and the exercise of this power is effective to determine status and rights even if a reviewing court should later conclude that the lower court erred in its ultimate conclusion as to its jurisdiction to grant relief on the merits. *United States* v. *United Mine Workers*, 330 U.S. 258, 293 (1947). In *United Mine Workers*, a federal district court found a union and its president guilty of criminal and civil contempt for violation of a temporary restraining order which, the defendants argued, the court had no jurisdiction to issue. Upholding the contempt convictions, this Court ruled:

> "Pending a decision on a doubtful question of jurisdiction, the District Court [in an earlier case] was held to have power to maintain the *status quo* and punish violations as contempt.
>
> "In the case before us, the District Court had the power to preserve existing conditions while it was determining its own authority to grant injunctive relief." *Id.* at 292-93 (footnote omitted).

Thus, whether or not this Court should ultimately conclude that the District of Columbia federal courts had

[20] Although the district court in *Harper* explicitly found that the 60-day period had not run at the time its interim suspension order was entered (Appendix A attached hereto; *Harper*, 362 F. Supp. at 744-45), the court below found to the contrary, without explanation and without referring to the *Harper* finding. (J.S. App. 3a). We believe the *Harper* court's finding was correct; in any event, however, the effectiveness of its suspension order did not depend on whether the 60-day period had run. *See, e.g.*, Section 10(d) of the APA, 5 U.S.C. § 705, which confers authority to "issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings."

jurisdiction under the APA, those courts plainly had the authority to grant interim relief preventing effectuation of the challenged action while the jurisdictional question was being determined. The district court duly exercised that authority by suspending the Section 5 60-day period in a proceeding to which the officer with statutory responsibility for acting under that section (the Attorney General) was a party.[21] And during such suspension the Attorney General objected to Act 1205. The only clearance sought by South Carolina under Section 5 having been timely denied by the Attorney General, it necessarily follows that South Carolina is without authority to enforce the statute.

South Carolina has taken the position—with which the court below agreed—that the Attorney General's objection is irrelevant on the ground that South Carolina was not "bound" by the actions of the District of Columbia courts in *Harper*. J.S. App. 5a. That position is erroneous in two respects.

First, inherent in the structure of the Voting Rights Act is the consequence that once South Carolina chose to submit legislation to the Attorney General for clearance, his action (whether objection or clearance by non-objection) will affect not only the State, but also the voting rights of every present and future voter in the State, regardless of whether those persons are formal parties to the proceeding under Section 5 instituted by the submission to the Attorney General or subsequent review thereof. It would be an absurdity to suggest that all whose interests are directly involved and may be affected must be formal parties to a submission to the

[21] This Court has recognized that statutory time periods are not inflexible and may be extended when required by applicable legal or equitable principles. *E.g.*, *American Pipe & Construction Co.* v. *Utah*, 414 U.S. 538 (1974); *Burnett* v. *New York Central*, 380 U.S. 424 (1965); *Glus* v. *Brooklyn Eastern Terminal*, 359 U.S. 231 (1959); *Holmberg* v. *Armbrecht*, 327 U.S. 392 (1946).

Attorney General or to proceedings to review his actions thereon. Thus, while it is arguable that neither South Carolina nor its voters (black or white) are directly "bound" by the *Harper* judgment as such, all are "bound" by Section 5 of the Voting Rights Act and their interests were necessarily affected by an operative event thereunder—the Attorney General's objection to Act 1205 —which precluded enforcement of the Senate apportionment plan unless judicial preclearance were obtained.

Second, South Carolina's claim to be treated as a stranger to the judicial review proceedings in *Harper* to review the Attorney General's initial decision not to object to Act 1205 must be viewed in light of the facts. It was South Carolina which initiated the legal proceedings by selecting, as the forum for Section 5 review of its legislation, clearance from the Attorney General rather than a declaratory judgment from a three-judge District Court for the District of Columbia.[22] It received, from the Attorney General, notice both of the district court's order suspending the Section 5 60-day period [23] and of the Attorney General's objection to Act 1205, including notice that the objection was being entered pursuant to the order of the District of Columbia District Court that he make an independent determination. The State had a continuing opportunity to intervene at every stage of the judicial proceedings,[24] or to seek clearance of its legislation through the alternative Section 5 route of a declaratory judgment by a three-judge District Court for the District of Columbia.

If South Carolina is in any sense a nonparty, it is entirely as a result of a tactical decision on its part that, by refraining from appearing in *Harper*, it would be able to ignore the objection to Act 1205 which was likely to result once the Attorney General performed his statutory mandate. This is the sort of evasive tactic which Congress found to be commonly used to deny minorities their voting rights, and which the Act was designed to defeat:

> "The previous legislation has proved ineffective for a number of reasons. Voting suits are unusually onerous to prepare. . . . Litigation has been exceedingly slow. . . . Even when favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the federal decrees. . . . Alternatively, certain local officials have defied and evaded court orders . . . ." *South Carolina* v. *Katzenbach*, 301 U.S. at 314 (footnote omitted).

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[22] *Cf. James Talcott, Inc.* v. *Allahabad Bank, Ltd.*, 444 F.2d 451, 462 (5th Cir. 1971).

> "If the party against whom the prior judgment is asserted did have the initiative in the prior suit, however, in the sense that he instigated the suit, there would appear to be *no reason* to assume that he did not have a full and fair opportunity to litigate. Thus, there is no reason to assume that he lacked sufficient *motive* to litigate when it was he himself who commenced the litigation. Similarly, it would be anomalous to consider the fairness of his forum when it was he himself who chose the forum. In short, a party who instigated the prior suit is in a poor position to complain about the adequacy of his *opportunity* to litigate in that suit."

[23] Stipulations, Par. 11, App. 55.

[24] *McKinney* v. *Alabama*, 424 U.S. 669, 676 (1976). *See also Penn-Central Merger Cases*, 389 U.S. 486, 505 (1968); *U.A.W., Local 283* v. *Scofield*, 382 U.S. 205, 212-13 (1965); *Nuesse* v. *Camp*, 385 F.2d 694, 702 (D.C. Cir. 1967); *Red River Broadcasting Co.* v. *FCC*, 98 F.2d 282, 286 (D.C. Cir.), *cert. denied*, 305 U.S. 625 (1938):

> ". . . Such a person should not be entitled to sit back and wait until all interested persons who do so act have been heard, and then complain that he has not been properly treated. To permit such a person to stand aside and speculate on the outcome; if adversely affected, come into this court for relief; and then permit the whole matter to be reopened in his behalf, would create an impossible situation."

> "The judicial process affords those who are determined to resist plentiful opportunity to resist. Indeed, even after apparent defeat resisters seek new ways and means of discriminating. Barring one contrivance too often caused no change in result, only in methods." H.R. Rep. No. 439, 89th Cong., 1st Sess. 9-10 (1965).

In sum, under the principles reviewed above, the election of South Carolina not to participate in *Harper* could not be dispositive. The South Carolina voting changes may not be implemented unless and until they have been cleared under one of the two methods provided by Section 5. The State's efforts to obtain clearance from the Attorney General were ineffectual because the 60-day objection period was lawfully extended and, during such extended period, the Attorney General entered an objection. South Carolina is accordingly precluded under Section 5 from enforcing Act 1205 unless and until it seeks and receives a determination by a three-judge District Court for the District of Columbia that Act 1205 is not discriminatory in purpose or effect.

II. The Decision of the Attorney General Not to Make an Independent Determination Under Section 5 Was Reviewable.

The court below, having concluded that appellees were not bound by the determinations of the District of Columbia federal courts in *Harper*, proceeded to reexamine the question of reviewability of the Attorney General's action and concluded that the District of Columbia courts had wrongly decided that issue. J.S. App. 13a-25a. We have demonstrated in Point I above that the effectiveness of the Attorney General's objection under Section 5 does not turn on the correctness of the holding of the District of Columbia courts in *Harper* on reviewability. In any event, as we show below, and as the United States now agrees, the Attorney General's objection was likewise timely because the *Harper* courts were correct in

ruling that they had power under the APA to review the Attorney General's failure to review Act 1205 under the standards of Section 5 and to require him to discharge that duty.[25]

The APA establishes a presumption in favor of judicial review of all agency actions,[26] except "to the extent that" review is precluded by statute, or agency action is "committed to agency discretion by law." APA § 10, 5 U.S.C. § 701(a). The right of review created by the APA extends to all final agency actions for which there is "no other adequate remedy in a court." *Id.* § 10(c), 5 U.S.C. § 704.

Under these statutory provisions and applicable judicial authorities, the Attorney General's decision that he was legally barred from making an independent determination of the validity of Act 1205 was clearly not immune from judicial review.[27]

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[25] U.S. Juris. Br. 15. There can no longer be any doubt as to the correctness of the ruling in *Harper* that the Attorney General had committed legal error in refusing to make an independent judgment as to Act 1205 and deferring to the District Court for South Carolina. The Attorney General now agrees that he may not under Section 5 substitute the ruling of a court for his independent judgment. As the Attorney General noted, that position was confirmed by this Court's decision in *Connor* v. *Waller*, 421 U.S. 656 (1975). The Court there ruled that a district court may not even entertain a constitutional challenge to legislation subject to the Voting Rights Act unless that legislation has first been cleared under Section 5. *See* U.S. Juris. Br. 9, and 8-9 n. 4.

[26] " 'Agency Action' includes the whole or part of an agency rule . . . or failure to act." 5 U.S.C. § 551(13). *See Chicago* v. *United States*, 396 U.S. 162 (1969).

[27] If review jurisdiction existed, the District of Columbia courts also had all necessary power to grant an effective remedy after performing their review function, and were not limited in this regard by the statutory 60-day period under Section 5 (even apart from the district court's earlier interim tolling order). It is well established that courts exercising their authority to review agency action are not constrained in granting ultimate relief by statutory time limits on the agency action under review. *CAB* v. *Delta Airlines*, 367

A. *The Voting Rights Act Does Not Preclude Judicial Review.*

Nothing in the Voting Rights Act or its legislative history overcomes the presumption in favor of reviewability created by the APA.[28] In *Abbott Laboratories* v. *Gardner*, 387 U.S. 136 (1967), this Court put to rest any argument that Congress' failure to include an express review provision in a particular statute evidences an intent to preclude review that would exempt action under the statute from APA review: "[J]udicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress." *Id.* at 140. *See also Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 410 (1971); *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 157 (1970).

Last year, this Court reaffirmed the presumption of reviewability in *Dunlop* v. *Bachowski*, 421 U.S. 560 (1975). There, a union member sought review of the Secretary of Labor's decision not to sue to challenge an election under § 402(b) of the Labor-Management Reporting and Disclosure Act (Landrum-Griffin), 29 U.S.C. § 482(b) (1970). The statute creates no right of review and, since it involves a decision whether or not to bring a lawsuit, would seem to authorize the broadest type of

U.S. 316, 326-27 (1961); *International Harvester Co.* v. *Ruckelshaus*, 478 F.2d 615 (D.C. Cir. 1973). That principle was reaffirmed in *Bachowski* v. *Brennan*, 502 F.2d 79, 85-86 (3d Cir. 1974), *rev'd on other grounds sub nom. Dunlop* v. *Bachowski*, 421 U.S. 560 (1975), where a 60-day time limit for agency action was held not to bar judicially ordered relief outside the 60-day period.

[28] Congress was aware of the ruling in *Harper* v. *Levi* when it extended the Voting Rights Act in 1975. Indeed, the decision was referred to in the Senate committee report and was praised on the House floor by the floor manager of the extending legislation. *See* S. Rep. No. 295, 94th Cong., 1st Sess. 18 (1975); 121 Cong. Rec. H7631 (daily ed. July 28, 1975).

discretion. Nonetheless, the Supreme Court held flatly that the Secretary's decision was subject to judicial review:

> "In the absence of an express prohibition in LMRDA, the Secretary, therefore, bears the heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review of his decision. 'The question is phrased in terms of "prohibition" rather than "authorization" because a survey of our cases shows that judicial review of a final agency action by an aggrieved person will not be cut off unless there is persuasive reason to believe that such was the purpose of Congress.' *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 140 (1967). . . .
>
> . . . .
>
> "We therefore reject the Secretary's argument as without merit. He has failed to make a showing of 'clear and convincing evidence' that Congress meant to prohibit all judicial review of his decision." *Id.* at 567-68.[29]

The Voting Rights Act itself contains evidence that Congress considered the question of preclusion of judicial review and decided to foreclose review only of certain actions other than those under Section 5. Section 4(b) of the Act provides:

> "A determination or certification of the Attorney General or of the Director of the Census under this section or under section 1973d or 1973k of this title shall not be reviewable in any court. . . ." 42 U.S.C. § 1973b(b).

Thus, where Congress intended to withhold judicial review, it provided expressly to that effect.[30] Congress en-

[29] As here, the statute in *Dunlop* had a 60-day time period for agency action. *See* note 27 *supra*.

[30] Notwithstanding the language of Section 4(b), the Court of Appeals for the District of Columbia Circuit affirmed the

acted no such provision precluding review of Section 5 determinations.

Although the Voting Rights Act does not expressly preclude review of Section 5 determinations (unlike those under Section 4), the court below found in the mere fact that the Act gives the Attorney General a stated period in which to object "compelling reason" to believe Congress meant to exclude judicial review. As the United States has noted in its Amicus Brief, however, the statutory time limit was directed at assuring that covered jurisdictions would obtain prompt clearance of plainly nondiscriminatory legislation and does not place an absolute limitation on the period for reviewing voting law changes.[31] Indeed, the Attorney General's regulations recognize the permissibility of delay in difficult cases by providing that the 60-day period does not begin to run until the Attorney General has received any additional information he may request from the submitting authority. 28 C.F.R. § 51.18 (1976). This Court has upheld this provision of the regulations, rejecting the argument that the delay it sometimes entails violates the Act. *Georgia* v. *United States*, 411 U.S. 526, 539-41 (1973). Likewise, any delay resulting from judicial correction of legal error made by the Attorney General in declining to object to a racially significant voting change does not impede the overall application of Section 5. To the contrary, judicial clarification of the provisions of Section 5 has promoted, and will continue to promote, its effective application.

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authority of the District of Columbia federal district court to review certain determinations of the Director of the Census, holding that "even where the intent of Congress was to preclude judicial review, a limited jurisdiction exists in the court to review actions which on their face are plainly in excess of statutory authority." *Briscoe* v. *Levi*, 535 F.2d 1259, 1265 (D.C. Cir. 1976). This decision is presently before this Court, certiorari having been granted on December 6, 1976 (No. 76-60).

[31] U.S. Juris. Br. 17.

B. *The Action of the Attorney General Reviewed in* Harper *Was Not an Action Committed to Agency Discretion.*

Appellees argued in the court below that the absence of a statutorily defined standard is evidence of congressional intent to commit all determinations under Section 5 to the Attorney General's complete discretion and thus put them beyond the reach of judicial review under the APA.

That contention is foreclosed by decisions of this Court and by the Attorney General's own regulations. They establish that the Attorney General must base his decision on the same determination as would a three-judge District Court for the District of Columbia in a declaratory judgment action under Section 5. Whether rendered by the Attorney General or the special three-judge court, the decision required by Section 5 is a traditional adjudication—the application of established legal rules to a specific factual situation.

The APA's exception from judicial review for agency action "committed to agency discretion" is "a very narrow exception." *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410 (1971). It is "applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.'" *Id.*, *quoting* S. Rep. No. 752, 79th Cong., 1st Sess. 26 (1945). It cannot be argued that there is "no law to apply" to the Attorney General's decisions under Section 5. To the contrary, both the substantive standard and the burden of proof are precisely defined by the statute and regulations. In upholding the Attorney General's regulations, this Court has observed that the Attorney General does not interpret "the statute to grant him unfettered discretion" but instead those regulations require

him to follow "objective ground rules."[32] *Georgia* v. *United States*, 411 U.S. at 536. The Court approved the Attorney General's adoption of the same substantive standard and burden of proof that would apply in a declaratory judgment action, noting that "[a]ny less stringent standard might well have rendered the formal declaratory judgment procedure a dead letter by making available to covered states a far smoother path to clearance." *Id.* at 538. *See also Perkins* v. *Matthews*, 400 U.S. 379, 385 (1971).

Appellees' arguments as to the purported discretionary nature of the Attorney General's Section 5 determinations might be of relevance if the Attorney General's factual determinations or his independent judgment on the merits had been challenged in *Harper*. But the *Harper* court was asked to make a legal, not a factual determination. *Harper* involved the Attorney General's failure to perform a statutory duty to make an independent judgment; the correctness of any independent judgment was not at issue.[33]

[32] The Attorney General's regulations make clear that he reads Section 5 to require him to make determinations that are nondiscretionary. They provide in part:

> "Section 5, in providing for submission to the Attorney General as an alternative to seeking a declaratory judgment from the U.S. District Court for the District of Columbia, *imposes on the Attorney General what is essentially a judicial function*. Therefore, the burden of proof on the submitting authority is the same in submitting changes to the Attorney General as it would be in submitting changes to the District Court for the District of Columbia. The Attorney General shall base his decision on a review of material presented by the submitting authority, relevant information provided by individuals or groups, and the results of any investigation conducted by the Department of Justice. If the Attorney General is satisfied that the submitted change does not have a racially discriminatory purpose or effect, *he will not object to the change* and will so notify the submitting authority. If the Attorney General determines that the submitted change has a racially discriminatory purpose or effect, he will enter an objection and will so notify the submitting authority. If the evidence as to the purpose or effect of the change is conflicting, and the Attorney General is unable to resolve the conflict within the 60-day period, *he shall, consistent with the above-described burden of proof applicable in the District Court, enter an objection* and so notify the submitting authority." 28 C.F.R. § 51.19 (1976) (emphasis added).

The challenge in *Harper* was strikingly similar to that which this Court considered in *Georgia*, *supra*. There, the United States had sued to enjoin the implementation of a Georgia voting change to which the Attorney General had objected. The objection was claimed by the state to be invalid because, applying his regulations, the Attorney General had based his determination on the state's failure to sustain its burden of proof, rather than on a finding that the voting change in fact had a discriminatory purpose or effect. If the Attorney General's decisions were unreviewable, the Court could not have entertained that contention. However, the Court reviewed and upheld the Attorney General's objection, ruling that the placement of the burden upon the state was permitted, if not required, by the Act, and that the Attorney General's letter of objection had "notified the state with sufficient clarity" of the basis for the objection. The Court concluded: "[W]e hold that his objection pursuant to that standard [allocating the burden of proof] was lawful and effective." 411 U.S. at 538-39. Thus in *Georgia*, as in *Harper*, the lawfulness of the Attorney General's action under Section 5 was judicially reviewed.[34]

[33] The *Harper* action was thus in the nature of mandamus under 28 U.S.C. § 1361. *Accord*, U.S. Juris. Br. 15.

The Attorney General has made clear that his independent judgment was and is that Act 1205 violates the substantive standards under the Voting Rights Act. The sole basis for his nonobjection was his assumption—which the *Harper* court held erroneous, and which he has since repudiated—that he was "constrained" to "defer" to the *Twiggs* court's Fifteenth Amendment determination.

[34] The court below reasoned that to uphold review in this instance would require that the Attorney General always make " 'explicit the basis' and reasoning for that determination." J.S. App. 22a. But no such result is required for a review of the limited question of

In the light of the foregoing authorities, particularly this Court's decisions in *Georgia* and *Dunlop*, it is clear that the *Harper* court correctly held reviewable the Attorney General's decision that he was legally barred from making his own independent review of a voting change under Section 5.

C. *Plaintiffs Have No Other Adequate Remedy in the Courts.*

The court below also rested its judgment on the ground that, since appellants can challenge Act 1205 under the Fourteenth and Fifteenth Amendments, they have an adequate remedy in court for any error or wrongdoing of the Attorney General and are therefore precluded from APA review under 5 U.S.C. § 704. This view totally misconceives the purpose of Section 5 to end the century-long frustration, by some jurisdictions, of the Fifteenth Amendment's guarantees. *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966). *See also Perkins* v. *Matthews*, 400 U.S. 379, 388-89 (1971); *Allen* v. *State Board of Elections*, 393 U.S. 544, 565-69 (1969).

In *Katzenbach* the Court summarized the history of litigation to implement the Fifteenth Amendment and recognized the shortcomings of that process as a means of achieving equal voting rights. *Id.* at 310-15. The Court observed there that "[e]ven when favorable decisions have finally been obtained, some of the States affected have merely switched to discriminatory devices not covered by the federal decrees or have enacted difficult new tests designed to prolong the existing disparity between white and Negro registration." [35] *Id.* at 314. "The Voting Rights Act of 1965 reflects Congress' firm intention to rid the country of racial discrimination in voting. The heart of the Act is a complex scheme of stringent remedies . . . . Section 5 prescribes . . . the suspension of all new voting regulations pending review by federal authorities . . . ." *Id.* at 315-16 (footnotes omitted). The court below failed to recognize that Section 5 was prompted by the inadequacy of traditional constitutional litigation to eliminate barriers to equal voting rights.

In its Amicus Brief on jurisdiction, the United States has set forth some of the important effects of Section 5's new remedy:

> "This suspension and clearance procedure has five legally significant effects upon the rights of voters in covered jurisdictions. First, it frees them from the requirement of complying with changed elec-

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statutory interpretation involved here. In an analogous situation, the Seventh Circuit held reviewable the question of whether a Federal Trade Commissioner had misconstrued his statutory obligation when he voted to issue a complaint alleging a violation of the Robinson-Patman Act, 15 U.S.C. § 13(c), *Jewel Companies, Inc.* v. *FTC*, 432 F.2d 1155, 1159-60 (7th Cir. 1970). The Commissioner had issued a statement accompanying the complaint to the effect that he construed the Commission's enforcement obligation to be mandatory when it has reason to believe there has been a violation of the Robinson-Patman Act and that he had no discretion to consider the public interest. Although courts will not ordinarily review such prosecutorial decisions (and FTC commissioners do not ordinarily explain—except for what is needed to allege a violation of law—the basis for a prosecutorial decision), the district court ruled that the Commissioner *did* have discretion and remanded to the Commission. The Seventh Circuit held that since the question was "inherently a legal one and does not involve any factual determinations," the district court had properly granted review. The court below conceded that no factual review was involved in *Harper*. J.S. App. 22a n.28.

[35] "The Court of Appeals for the Fifth Circuit ordered the registrars of Forrest County, Mississippi, to give future Negro applicants the same assistance which white applicants had enjoyed in the past, and to register future Negro applicants despite errors which were not serious enough to disqualify white applicants in the past. The Mississippi Legislature promptly responded by requiring applicants to complete their registration forms without assistance or error, and by adding a good-morals and public-challenge provision to the registration laws. *United States* v. *Mississippi*, 229 F. Supp. 925, 996-997 (dissenting opinion)." *South Carolina* v. *Katzenbach*, 383 U.S. at 314 n.19.

tion laws or procedures until the changes are shown to have no racially discriminatory purpose or effect. Second, it interposes the federal government between the voter protected by the Fifteenth Amendment and the covered jurisdiction. Third, it imposes on the jurisdiction, not the citizen, the burden of initiating clearance proceedings. Fourth, it transfers the venue of such proceedings to the District of Columbia. Fifth, it places the burden of proving the absence of discriminatory purpose or effect upon the covered jurisdiction." U.S. Juris. Br. 12-13.

The opinion below would deprive appellants of every one of these benefits, permanently, and without remedy. The appellants' right to challenge existing voting laws under the Fourteenth or Fifteenth Amendments is irrelevant to the protection or enjoyment of these statutory benefits inasmuch as a constitutional challenge would neither protect these statutory rights during litigation nor subsequently restore them to successful plaintiffs.[36]

For these reasons the court below was also in error in ruling that the Attorney General's deferral did not

[36] Congress believes the Section 5 protections to be so critical to voting equality that it twice extended the duration of their effectiveness. In 1970 it did so because:

> "The committee is convinced that section 5 procedures are an integral part of the rights afforded by the 1965 act. Federal review of voting law changes insures that . . . the affected States and counties cannot, by employing changes in legislation undo or defeat the rights recently won by non-white voters. Section 5 . . . provides an important safeguard that new subterfuges will be promptly discovered and enjoined. Failure to continue this provision of the act would jettison a vital element of the enforcement machinery. It would reverse the burden of proof and restore time-consuming litigation as the principal means of assuring the equal right to vote." H.R. Rep. No. 397, 91st Cong., 1st Sess. 8 (1969).

In 1975 Congress recognized that reapportionment is a prime occasion for voting discrimination and described Section 5 as "the front line defense against voting discrimination." S. Rep. No. 295, 94th Cong., 1st Sess. 18 (1975). *See also* H. R. Rep. No. 196, 94th Cong., 1st Sess. 10-11 (1975).

finally affect any individual rights. The Court recognized in *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969), that individuals have enforceable interests in Section 5 protections—protections which are permanently extinguished if Section 5 is not enforced. These protections are, the Court held, intended "to make the guarantees of the Fifteenth Amendment finally a reality for all citizens. . . . [Congress] realized that existing remedies were inadequate to accomplish this purpose." *Id.* at 556. The denial by the court below of the relief sought by appellants would again postpone this attainment of the Fifteenth Amendment guarantees.

III. Prompt Relief Should Be Granted to Afford an Effective Remedy Against South Carolina's Invalid Senate Apportionment.

If the judgment below is reversed, a new reapportionment of the South Carolina Senate will be necessary unless South Carolina elects to seek and promptly obtains a declaratory judgment clearing Act 1205. There would then arise the question of when the new plan should be implemented. This Court and lower courts have repeatedly recognized that irreparable injury to voters resulting from an invalid apportionment or from a violation of the Voting Rights Act should be ended at the earliest practicable date, and special elections have generally been ordered when the next regularly scheduled election is more than a year away. *Swann* v. *Adams*, 383 U.S. 210 (1966); *Hughes* v. *WMCA, Inc.*, 379 U.S. 694 (1965). Special mid-term elections are especially appropriate where relief has been seasonably sought before the beginning of the term of office which is to be abbreviated. *Hadnott* v. *Amos*, 394 U.S. 358 (1969); *Hamer* v. *Campbell*, 358 F.2d 215 (5th Cir.), *cert. denied*, 385 U.S. 851 (1966).

In this case all conditions are met for such relief. The full membership (46) of the South Carolina Senate is

elected for four-year terms. Injunctive relief was sought in both this Court and the court below, before the commencement of the current Senate term.[37] The current Senate was elected in November 1976 and its members would not ordinarily stand for election again until 1980. There is no reason, however, why relief should be delayed past November 1978. At that time, there will be statewide elections in South Carolina for the offices of governor, lieutenant governor, all 124 members of the State House of Representatives, one United States senator, and six United States representatives, and for many other state and local offices. Thus, holding special Senate elections at that time would result in no disruption of the election process nor any voter confusion.

Litigation over the South Carolina Senate reapportionment is now in its sixth year. Prompt and effective relief should therefore be ordered in order to give meaning to the guarantees of the Voting Rights Act and of the one-man one-vote requirement of the Constitution. To this end the district court should be instructed (absent prompt judicial clearance of Act 1205 under Section 5) to order special elections in 1978. Unless South Carolina can obtain Section 5 clearance of a new Senate apportionment plan in time for 1978 elections, those elections should be held under a plan devised by the court.

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[37] An injunction against the 1976 South Carolina Senate elections was denied by the lower court on March 30, 1976, and by the Chief Justice on May 12, 1976.

CONCLUSION

For the foregoing reasons the judgment below should be reversed with directions to enter judgment for plaintiffs and to provide appropriate relief to insure that South Carolina's Senate will be properly constituted by no later than 1978.

Respectfully submitted,

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January 27, 1977

APPENDICES

APPENDIX A

Order of August 11, 1972, Harper v. Kleindienst, C.A. No. 1607-72 (D.D.C. 1972)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1607-72

JOY ROY HARPER, II,
Plaintiffs

vs.

RICHARD KLEINDIENST, *et al.*,
Defendants

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

This cause came on to be heard upon the complaint, the plaintiffs' Motion for Interim Relief and Memorandum in support thereof, the amendment to such motion made by plaintiffs in open court, and oral arguments of counsel. Upon consideration thereof, the Court being advised in the premises, the Court makes the following findings and conclusions.

FINDINGS

1. By letter dated June 30, 1972, the Attorney General of the United States notified the State of South Carolina that no objection would be interposed with respect to Sections 1 and 2 of Act 1205 of the State of South Carolina.

2. The time within which the Attorney General may interpose an objection to such sections under Section 5

of the Voting Rights Act, 42 U.S.C. § 1973c has not expired.

CONCLUSIONS

1. The Court has jurisdiction over the subject matter of this action and the parties thereto.

2. Unless appropriate steps are taken to maintain, *pendente lite*, the authority under Section 5 of the Voting Rights Act of defendant Attorney General of the United States to object to Sections 1 and 2 of Act 1205: (1) the jurisdiction of this Court to order final relief and (2) the rights of the plaintiffs to exercise their right to vote as citizens and voters in South Carolina free from acts or practices which the State has failed to prove do not have the purpose or effect of denying or abridging rights to vote on account of race or color, may be impaired, and such impairment would constitute an irreparable injury to the plaintiffs.

3. No injury will be caused if the following interim relief is granted, *pendente lite*.

WHEREUPON, it is by the Court, this 11th day of August 1972,

ORDERED

1. Pursuant to 5 U.S.C. § 705, the time within the Attorney General may interpose an objection to Act 1205 of the State of South Carolina is hereby extended pending further order of Court, or a further decision by the Attorney General as to whether South Carolina Act 1205 does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, giving reasons therefor, and submission of such decision to this Court.

2. The defendants are directed to notify the State of South Carolina of the entry of this order.

3. Jurisdiction of this case is retained by this Court.

4. This order does not preclude the defendants from litigating any issue in these proceedings in due course.

/s/ JUNE L. GREEN
U. S. District Judge

APPENDIX B

Memorandum of the United States in Response to the Court's Order of May 16, 1973 (filed July 16, 1973), *Harper* v. *Kleindienst*, 362 F. Supp. 742 (D.D.C. 1973)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1607-72

JOHN ROY HARPER, *et al.*,
Plaintiffs,

v.

ELLIOT L. RICHARDSON, *et al.*,
Defendants.

MEMORANDUM OF THE UNITED STATES IN RESPONSE TO THE COURT'S ORDER OF MAY 16, 1973

This memorandum is submitted pursuant to the Memorandum Order of this Court dated May 16, 1973, requiring the Attorney General of the United States to provide a "reasoned decision" and to "report the same to the Court in writing within 60 days from the date hereof." In accordance with this directive, we have studied the Order and have again examined our files to determine whether the conclusion reached and reasons for that decision are sound. We conclude again that they were. In submitting the present memorandum, we reserve the right to contest the determination that the Attorney General's action under Section 5 is judicially reviewable.

The submission under Section 5 of the first reapportionment plan for the South Carolina Senate (Act No. 932) was completed on January 5, 1972. The enactment

provided for two complete sets of election districts[1] and requested that we consider Plan B if Plan A was determined to be unconstitutional. The boundary lines used in these plans were in most instances identical, and both used only combinations of counties which resulted in a large number of multi-member voting districts.[2] The reapportionment systems also required that in the districts electing two or more senators, the candidates would have to run for numbered posts. Under a separate South Carolina statute, a person cannot be elected unless he receives a majority of the votes cast.

After an objection to these districts was interposed by the Attorney General on March 6, 1972, the State passed new redistricting proposals (Act No. 1205) and submitted them to the Attorney General pursuant to the Voting Rights Act. Again, two plans (A and B) were submitted. These significantly increased the number of multi-member districts.[3] On May 23, 1972, before the Attorney General ruled on the acceptability of the submitted plan, a three judge federal court in South Carolina which was considering challenges to the senate reapportionment based on Fourteenth and Fifteenth Amendment grounds filed an opinion holding that Act No. 1205 met the requirements of both amendments.[4] Finding that he was compelled to defer to the federal court's decision,

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[1] Under either plan 46 Senators were to be elected.

[2] Twelve of the 23 senatorial districts in Plan A were multi-member, while 14 of the 20 Plan B districts elected more than one senator.

[3] Under Act No. 932, only 35 of the 46 senators were to be elected from multi-member districts. Plan A of Act No. 1205 called for 43 of the 46 senate members to be elected from such districts.

[4] *Twiggs* v. *West* F. Supp. (D.S.C. 1972). The same three-judge panel had ruled on April 7, 1972, after the Attorney General's objection to Act No. 932, that the first senate plans failed to meet the one person, one vote standards required by the Fourteenth Amendment.

the Attorney General notified the State on June 30, 1972 that he interposed no objection to the reapportionment.

I.

Voting rights guaranteed by the Fifteenth Amendment and specifically protected by Section 5 of the Voting Rights Act can be abridged, among other ways, by submerging black majority areas into heavily white districts which would if permitted to stand, result in a white majority. See *Allen* v. *Board of Elections*, 393 U.S. 544, 569 (1969). Census statistics and past discrimination against black voters lead the Attorney General to the conclusion that in South Carolina a dilution of black voting strength would result from the senate plans submitted.

An examination of the reason for this conclusion is in order. Each of the four proposals considered by this Department was designed to elect 46 senators. Therefore, the ideal population for a senatorial district under these plans would have been 56,713.[5] Demographic data in the Census reports reflect that a substantial number of the 790,000 blacks residing in South Carolina are concentrated in several areas so that single-member districting would have resulted in four or five election districts with black population majorities. Two counties, Charleston and Richland, have over 70,000 blacks residing in them,[6] and five other counties[7] contain over 30,000 black residents.

[5] This analysis is based on the 1970 Census which shows 2,590,516 persons living in South Carolina.

[6] There are 168,414 whites and 77,884 blacks in Charleston; 159,092 whites and 73,437 blacks in Richland.

[7] Florence, Greenville, Orangeburg, Spartanburg, and Sumter.

Moreover, by applying a numbered post requirement[8] the senate plans aggravated the possible discriminatory effect on minority voters which might have arisen from the use of multi-member districts. Where multi-member districts exist and "single-shot" voting is permitted,[9] it is possible for a person to be elected with less than a majority of the votes cast.[10] Of course, it becomes impossible to win by taking advantage of "single-shot voting" if there is also a majority requirement as there is in South Carolina.[11]

We recognize that under some circumstances multi-member voting districts will not lead to the dilution or abridgment of minority voting rights. Unconstitutional discrimination occurs only where there is a showing that the minority has been excluded from the political process. See *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971). But recent decisions emphasize the principal [sic] that in circumstances where blacks have in the past been excluded or discriminated against in the political process, their voting strength cannot be minimized by using at-large

[8] Where more than one seat is to be filled from a single election district, the candidates must designate and run for a particular position, rather than permitting the top vote getters to win.

[9] In *Stevenson* v. *West* —— F. Supp. —— (D.S.C. 1972), a companion case of *Twiggs*, the court declared the South Carolina full-slate law unconstitutional.

[10] For example, if there are five seats to be filled with nine candidates running and 169 voters, a group of 30 persons could all cast their ballots for candidate A only. Then, assuming that there are four other candidates (B, C, D, E) who are strong vote getters and receive 70 ballots each and the remaining votes are spread relatively evenly over the remaining four candidates with F and G getting 20 votes each and H and I receiving 15 each, candidate A would be elected although he received only 30% of the votes cast.

[11] The Supreme Court has upheld an objection interposed in a similar case where the Attorney General found that the combination of multi-member districts, numbered posts and majority voting requirement resulted in a racially discriminatory effect on voting. *Georgia* v. *U.S.* 41 U.S.L.W. 4570 (May 7, 1973).

voting, *Petersburg* v. *United States*, —— F. Supp. —— (D.D.C. 1972) aff'd —— U.S. —— (1973), or by the use of multi-member election districts, *Graves* v. *Barnes*, 343 F. Supp. 704 (W.D. Tex. 1972) aff'd *sub nom White* v. *Register*, 41 U.S.L.W. 4885 (1973);[12] *Sims* v. *Amos*, C.A. No. 1744-N (N.D. Ala.) (January 3, 1972).[13]

In South Carolina blacks have in the past been continually and consciously prevented from fully exercising the right to vote. See *e.g. Rice* v. *Elmore*, 72 F. Supp. 516 (D.S.C., 1947).

In view of these facts, we were and still are compelled to conclude that Act No. 1205 has a clear and substantial racial effect in contravention of the Fifteenth Amendment and its protections under Section 5 of the Voting Rights Act. Indeed, the reasons for finding a contravention of the Fifteenth Amendment in the first set of senate plans submitted (Act No. 932), as we did in our objection letter of March 6, 1972, are also present upon reviewing the existing Act in question (Act No. 1205).

II.

Notwithstanding our conclusion that Act No. 1205 has a discriminatory effect, we find that we are constrained by the constitutional doctrine of separation of powers and by commonly accepted principles of appeal and judicial review from interposing an objection to its implementation. In a word, the Attorney General of the United States does not have the authority to overrule a decision of a federal court.

That interposing an objection would constitute the overruling of a federal court can be seen by examining

[12] *White* also reversed the lower court's decision in part which is not relevant here.

[13] Also see *Taylor* v. *McKeithen* 407 U.S. 191 (1972), n. 3, and the preference for single member districts shown by the court in *Connor* v. *Johnson*, 402 U.S. 690, 692 (1971).

the circumstances before us. The senate reapportionment plans submitted to the Attorney General were properly before the federal district court in *Twiggs* v. *West*, *supra*, a point which is not in dispute. The question of whether the boundary lines of the plans constituted a violation of the Fifteenth Amendment was specifically raised and decided. This is the same question, viewed in light of the same Fifteenth Amendment, on which the Attorney General would rule under Section 5. Certainly it is well recognized and accepted that our constitutional system does not permit an agency of the executive branch of government to sit in review of a federal court decision. And least of all would such an action be appropriate when it would involve, as it would here, adjudicating essentially the same question in light of essentially the same law as was adjudicated by a federal court having undisputed jurisdiction to do so.

Thus, in *Connor* v. *Johnson*, 402 U.S. 690 (1971), the Court held unanimously that a state redistricting plan formulated and ordered by a federal court need not be approved by the Attorney General under Section 5. "A decree of the United States is not within the reach of Section 5 of the Voting Rights Act." at 691.[14]

Connor, of course, differs from the present case insofar as the voting plan there was formulated by the district court itself, while in South Carolina the plan was

[14] As Mr. Justice Black noted in his separate opinion in *Connor* (402 U.S. at 695):

> Under our constitutional system it would be strange indeed to construe § 5 of the Voting Rights Act of 1965, 79 Stat. 739, 42 U.S.C. § 1973c (1964 ed., Supp. V), to require that actions of a federal court be stayed and reviewed by the Attorney General or the United States District Court for the District of Columbia.

The Attorney General's deferral to judicial determination was also specifically noted by the Supreme Court in *Georgia* v. *United States*, 41 U.S.L.W. 4570, 4573 and n. 6 (1973).

formulated by the legislature. Since it might be argued that state-formulated plans are "suspect", while court-formulated plans are not, this difference would ordinarily have significance worth exploration. The difference is not significant here, however, since the South Carolina plan *was* examined by a federal court which reviewed the plan for conformity to the same Fifteenth Amendment standards which presumably would have governed the court if it had had the task of devising the plan itself.

It might also be argued that although the Fifteenth Amendment guides the courts and the Attorney General alike in voting rights cases, Section 5 and its scheme for decision-making are different enough from court adjudication of Fifteenth Amendment questions to provide the Attorney General with an independent basis for reviewing the same questions. Under the Voting Rights Act the submitting authority has the burden of showing that the change does not have a racially discriminatory purpose or effect, *Georgia* v. *United States*, *supra*, and must rely on the Attorney General's judgment. Yet these differences are not sufficient to furnish a basis for the Attorney General to enter an objection where it will have the effect of overturning a federal judicial decision on the merits of the Fifteenth Amendment question.[15] The same arguments would, of course, apply in *Connor*, but there the Court had no problem in finding Section 5 inapplicable.

Reliance on the proposition that Fifteenth Amendment and Section 5 cases are grounded on separate forums and burdens cannot alter the particular circumstances now before the Attorney General. Plaintiffs conferred Fifteenth Amendment jurisdiction on the Federal court

[15] Also, there is no indication here that the district court was in equipoise and decided the way it did merely because of the burden of proof.

in South Carolina and then proceeded to fully litigate their claims under it. Section 5 was not designed and does not provide the opportunity for them to contest the same questions before the Attorney General.

For the foregoing reasons, on behalf of the Attorney General, we conclude that the reapportionment plan for the South Carolina Senate (Act No. 1205) would ordinarily be objectionable under Section 5 of the Voting Rights Act, but that in light of a contrary finding by a federal court having undisputed jurisdiction over controlling Fifteenth Amendment questions of fact and law, we have no legitimate authority to interpose an overriding objection to the administration of that plan.

Respectfully submitted,

J. STANLEY POTTINGER
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